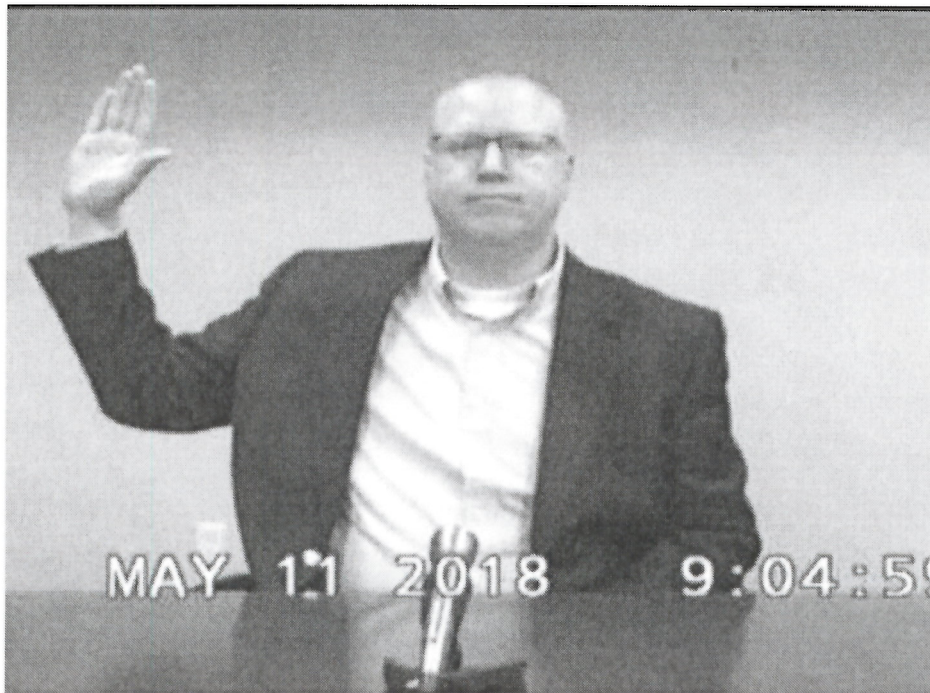


United States District Court
Eastern District of Wisconsin

Johnsonville Sausage v. Klement Sausage
16-CV-938



Video Deposition of
Kelly Jackson - Rule 30(b)(6)
Recorded 05/11/2018 in Milwaukee, WI
9:04 am - 4:17 pm, 353 mins. elapsed

Magne-Script

(414) 352-5450



21935 Condensed transcript with index

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<p>1 reading?</p> <p>2 Q No, that's fine.</p> <p>3 A Keep reading?</p> <p>4 Q Then go to paragraph 6.</p> <p>5 A Okay. Claims 1 to 7 are finally rejected under 35</p> <p>6 U.S.C. 103(a) as being unpatentable over Reskow in</p> <p>7 view of Mellow, et al." Would you like me to</p> <p>8 continue?</p> <p>9 Q No.</p> <p>10 A Okay.</p> <p>11 Q From Johnsonville's standpoint, are their claims</p> <p>12 rejected based on these two examiner statements?</p> <p>13 A I see several statements from the examiner here, so I</p> <p>14 -- I'm not sure that I can answer that question by</p> <p>15 saying it's based on those two. I see several</p> <p>16 statements in the document. And again, I'm not --</p> <p>17 Q Is it based on --</p> <p>18 A -- I'm not a patent attorney.</p> <p>19 Q Yes.</p> <p>20 MS. WILBERT: I've got a notice that the</p> <p>21 food has arrived, and I think we've been going</p> <p>22 for about an hour and a half.</p> <p>23 BY MR. FEMAL:</p> <p>24 Q Yeah, is it --</p> <p>25 MS. WILBERT: Could we take a break soon?</p>	<p>1 two questions here, so why don't I finish up and</p> <p>2 it'd be less than five minutes.</p> <p>3 MS. WILBERT: Okay.</p> <p>4 BY MR. FEMAL:</p> <p>5 Q And then give you Exhibit 4 in Kohtala's dep. And you</p> <p>6 don't have to pile --</p> <p>7 A And this is --</p> <p>8 Q -- all the way --</p> <p>9 A This is five minutes?</p> <p>10 Q Yeah. No, you don't have to pile -- it's a very short</p> <p>11 question on this one.</p> <p>12 A What is this?</p> <p>13 Q It looks like the complete file history of that</p> <p>14 utility patent application.</p> <p>15 A Yeah, I think -- I think we should take a break.</p> <p>16 Q Yeah, but I'm going to ask a real simple question.</p> <p>17 A Okay.</p> <p>18 Q Why was the application abandoned by Johnsonville?</p> <p>19 A "Why was the application abandoned by Johnsonville?"</p> <p>20 Which application are you referring to?</p> <p>21 Q Utility.</p> <p>22 A Utility application. If I can confer with my notes</p> <p>23 again. So I don't have a specific reason on why. I</p> <p>24 just know that as of June 2011, after the final office</p> <p>25 action and the examiner interview, that Kevin Ladwig,</p>
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<p>1 BY MR. FEMAL:</p> <p>2 Q Is it based on the prior art, though, of Mello and</p> <p>3 Reskow?</p> <p>4 A I see Mello and Reskow cited as some of the reasons</p> <p>5 from the examiner here.</p> <p>6 Q Yeah. Is there any other prior art references in</p> <p>7 there that you can see?</p> <p>8 MS. WILBERT: Again, I'd like to reiterate,</p> <p>9 time for a lunch break.</p> <p>10 MR. FEMAL: Yeah.</p> <p>11 BY MR. FEMAL:</p> <p>12 Q Answer the question. Do you see any other references?</p> <p>13 A I don't see any in this document.</p> <p>14 Q Okay.</p> <p>15 THE WITNESS: We good for a break?</p> <p>16 MS. SCHLICHT: Well, there's only a couple</p> <p>17 more questions in this one section --</p> <p>18 MR. FEMAL: Yeah, and we're done --</p> <p>19 MS. SCHLICHT: -- and then we can take a --</p> <p>20 MR. FEMAL: -- yeah, with the section.</p> <p>21 MS. WILBERT: We've been going for 90</p> <p>22 minutes. You know, it's not like we just took a</p> <p>23 break 20 minutes ago. I'd really like to break</p> <p>24 for lunch and we can get right back at it.</p> <p>25 MR. FEMAL: Well, we are done with -- about</p>	<p>1 who I -- may have been his -- it's possible he was the</p> <p>2 supervisor at the time, told him to abandon the</p> <p>3 utility application. I don't have anything as to why</p> <p>4 the decision was made to do that.</p> <p>5 Q Was Johnsonville consulted about it before it was</p> <p>6 abandoned?</p> <p>7 A I don't know. I don't know what the specific</p> <p>8 conversations may have been.</p> <p>9 Q So you don't know who made the decision. Did</p> <p>10 Johnsonville make the decision, consulting with</p> <p>11 Quarles & Brady, or --</p> <p>12 A According to my notes, Kevin Ladwig told David</p> <p>13 Nicholson to abandon the utility application. I don't</p> <p>14 have any information on the discussions around that or</p> <p>15 the motive.</p> <p>16 Q Okay. And the only page of relevance here is page 2</p> <p>17 in the file history, which --</p> <p>18 A Page 2?</p> <p>19 Q -- is probably Notice of Abandonment?</p> <p>20 A Okay.</p> <p>21 Q And as you sit here today, Johnsonville doesn't know</p> <p>22 all the reasons why they abandoned the application?</p> <p>23 A I'm sorry, one more --</p> <p>24 Q Johnsonville doesn't know all the reasons why they</p> <p>25 abandoned the application.</p>

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<p>1 A Johnsonville is not aware of any specific reasons why 2 it was abandoned. 3 Q Okay. Thank you. 4 A Okay? 5 Q Yeah. 6 A Okay. You're right, that was quick. 7 Q Didn't I tell you it was short? 8 A That was quick. 9 THE REPORTER: All right. Off the record. 10 (Off the record) 11 THE REPORTER: We've taken a break for 12 lunch. We're back on the record. 13 BY MR. FEMAL: 14 Q On the prosecution of the U.S. Patent 29353610, who 15 was primarily responsible from Johnsonville? This 16 application. That's the utility application. 17 A Sorry. One more -- 18 Q Well, actually, I'm sorry. 19 A What was the number? I'm not -- 20 Q Yeah, I'm sorry. It's the design patent application, 21 293535610. 22 A Okay. David Nicholson was the primary member of 23 Johnsonville, employee of Johnsonville, who was 24 responsible for the design application. 25 Q And who was primarily responsive at Quarles & Brady</p>	<p>1 Quarles & Brady that inform Johnsonville's 2 knowledge are privileged. 3 A Okay. 4 MS. WILBERT: But if you want to -- 5 A I'm happy to share -- 6 MS. WILBERT: -- provide facts that 7 Johnsonville -- 8 THE WITNESS: Yeah. 9 MS. WILBERT: -- knows that aren't 10 privilege, you can do that -- 11 THE WITNESS: Yeah. 12 MS. WILBERT: -- in response to that 13 question. 14 A Yeah. I'm happy to share a characterization of the 15 history of the design. Here's what we are aware of. 16 So as of March 10th, 2009, Quarles & Brady filed a 17 provisional application on behalf of Johnsonville. 18 Then on November 11, 2009, Johnsonville instructed 19 Quarles & Brady to file utility and design 20 applications related to curved sausage trays. On or 21 around January 11, 2010, Dean Benson agreed to assign 22 his rights and inventions disclosed in the design and 23 utility applications to Johnsonville. Then on January 24 12th, 2010, Johnsonville received copies of the file 25 design and utility sausage tray applications from</p>
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<p>1 for coordinating with David? 2 A The attorneys with whom David Nicholson communicated 3 were Dan Radler and Luke Kohtala. 4 Q And who was the decision-maker over Mr. Nicholson on 5 the patent matters? 6 A I don't know that there was a decision-maker over him. 7 I'm not clear on that point. I know that he kept 8 several other employees informed. I don't know that 9 there's one specific individual who would have had 10 decision-making authority over him. 11 Q Did he report to anyone at Johnsonville? 12 A I'm certain. I don't know for sure who that is. I 13 know that he talked to several individuals: Kevin 14 Ladwig, Michael Suprick, Jim Mueller, Steve Laack, 15 Kara Lichtenberg, all tied to the project. I don't 16 know specifically who he reported to. 17 Q And are you familiar with the file history for the 18 application? 19 A I believe so, yes. 20 Q And what do you know about the file history of the 21 design patent application? 22 MS. WILBERT: At this point, I'll instruct 23 the witness not to reveal legal strategy related 24 to this case for the design patent. So 25 communications that Johnsonville has had with</p>	<p>1 Quarles & Brady. On March 2, 2010, Quarles & Brady 2 filed design and utility sausage tray applications 3 with the European Patent Office. On March 31st, 2010, 4 Johnsonville received the recorded assignments from 5 Quarles & Brady. On August 12th, 2010, Johnsonville 6 received the European search report from Quarles & 7 Brady. On August 17th, 2010, Quarles & Brady filed an 8 IDS, which disclosed the references from the search 9 report from the European examiner. And then November 10 2nd, 2010, Johnsonville received the notice of 11 allowance of its design application from Quarles & 12 Brady. Finally, on March 8th, 2011, Johnsonville 13 received from Quarles & Brady the issue notification 14 of the design patent. And I would say that would 15 characterize what we do know as a company about the 16 history there. The content of specific 17 communications, beyond what I just shared, would be 18 considered privileged and Johnsonville would not want 19 to waive that privilege. 20 Q Okay. And in regards to the design patent 21 application, are you familiar with the Mello, et al. 22 patent 5820904? 23 A I'm familiar with that patent. 24 Q And what do you know about the Mello patent, which was 25 Exhibit 9 at Kohtala's? Would you just take a quick</p>

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24 (Pages 93 to 96)

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<p>1 look?</p> <p>2 MS. WILBERT: Again, I'll object to</p> <p>3 privilege, and caution the witness that if what</p> <p>4 Johnsonville knows about that is because of this</p> <p>5 lawsuit and advice given with Quarles & Brady,</p> <p>6 that would be privileged. If there are facts</p> <p>7 related to that document that are independent of</p> <p>8 Johnsonville's communications with Quarles about</p> <p>9 this case, you can provide those facts.</p> <p>10 THE WITNESS: Okay.</p> <p>11 A I will say that we are familiar with the patent.</p> <p>12 We've seen that.</p> <p>13 BY MR. FEMAL:</p> <p>14 Q Okay. And the drawings, are you familiar with the</p> <p>15 drawings of the patent?</p> <p>16 A So again, we won't proceed any further on that note.</p> <p>17 I would refer back to what I shared previously</p> <p>18 regarding what is known by the company specifically</p> <p>19 pertaining to that patent or other aspects of the</p> <p>20 application process.</p> <p>21 Q Do you know why it was cited by the examiner?</p> <p>22 MS. WILBERT: Objection. Foundation.</p> <p>23 A I can't speak for the examiner.</p> <p>24 BY MR. FEMAL:</p> <p>25 Q I'm going to hand you Exhibit 82 Nicholson's dep. And</p>	<p>1 A Yes, we do.</p> <p>2 Q Do you sell curved trays in Canada?</p> <p>3 A Yes, we do.</p> <p>4 Q Independent of anything from Quarles & Brady, why</p> <p>5 would you not want to file a patent application in</p> <p>6 Canada?</p> <p>7 A I can't provide an answer for that.</p> <p>8 Q There is some curious decisions not to disclose the</p> <p>9 patent application on the utility during the</p> <p>10 prosecution of the 754 patent, and so I'm going to get</p> <p>11 into some questions about that. Was the 717</p> <p>12 application disclosed to the examiner for the design</p> <p>13 application?</p> <p>14 A 717 is the utility application?</p> <p>15 Q Yes.</p> <p>16 A What was the specific question again? Sorry.</p> <p>17 Q Yes. Was the 717 application disclosed to the</p> <p>18 examiner for the design application?</p> <p>19 A According to what the company knows, it was not</p> <p>20 disclosed to the design examiner.</p> <p>21 Q Why not?</p> <p>22 A We don't know.</p> <p>23 Q We went through previous questions showing that the</p> <p>24 design -- or, the utility patent application had two</p> <p>25 references to Mello and the Reskow references, which</p>
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<p>1 it appears to be an email from -- I think it's Kohtala</p> <p>2 to Dave Nicholson. And is that the Notice of</p> <p>3 Allowance communication from Quarles & Brady you had</p> <p>4 mentioned?</p> <p>5 A Subject says, "Sausage Tray Design Patent Application</p> <p>6 Notice of Allowance."</p> <p>7 Q And then you mentioned that there were some filings in</p> <p>8 Europe. Why wasn't there a subsequent filing in</p> <p>9 Canada?</p> <p>10 MS. WILBERT: Objection. Calls for</p> <p>11 information --</p> <p>12 Q Any reason?</p> <p>13 MS. WILBERT: Objection. Calls for</p> <p>14 information that may be subject to the</p> <p>15 attorney-client privilege. I caution you not to</p> <p>16 reveal any communications with your attorney</p> <p>17 about legal strategy related to a particular</p> <p>18 country. If Johnsonville has specific facts</p> <p>19 outside of your conversations with Quarles</p> <p>20 attorneys, you can respond.</p> <p>21 A I will not answer the question.</p> <p>22 BY MR. FEMAL:</p> <p>23 Q Well, what about marketing? Do you sell in Canada?</p> <p>24 A Do we sell products in Canada?</p> <p>25 Q Yes.</p>	<p>1 were not part of the design application. Was there</p> <p>2 any reason not to disclose?</p> <p>3 A So all I would say on that is that Johnsonville</p> <p>4 understands its employees involved in the prosecution</p> <p>5 of the patent turned over to Johnsonville's attorneys</p> <p>6 all the information we believed to be material to</p> <p>7 patentability. We believed that the employees</p> <p>8 involved in the prosecution of patent have not ever</p> <p>9 been -- have never attempted to deceive the patent</p> <p>10 office by failing to disclose material information.</p> <p>11 And we further understand that Johnsonville's</p> <p>12 employees involved in the prosecution of the patent do</p> <p>13 not recall, do not know specific reasons why the</p> <p>14 office actions were not disclosed.</p> <p>15 Q If Johnsonville didn't make that decision or know</p> <p>16 anything about the decision, who made the decision?</p> <p>17 Would it have been Quarles & Brady?</p> <p>18 A Your question suggests that there was a -- an</p> <p>19 intentional decision made regarding this. And again,</p> <p>20 I don't have -- we don't have as a company information</p> <p>21 to indicate that a specific decision was made.</p> <p>22 Q Was Johnsonville told that there is a duty to disclose</p> <p>23 information to the co-pending applications when there</p> <p>24 is design and utility on the same sausage tray?</p> <p>25 MS. WILBERT: Could I have that read back,</p>

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27 (Pages 105 to 108)

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<p>1 submitting the fee. Look at his signature. What</p> <p>2 you're looking at is the file history of the design</p> <p>3 patent.</p> <p>4 A Okay.</p> <p>5 Q And what's the date underneath Luke's signature?</p> <p>6 A I see a -- his name here and signature and a date of</p> <p>7 January 26th, 2011.</p> <p>8 Q Is there a difference between the date of January 7th</p> <p>9 and the date that he signed that? Is there a time</p> <p>10 period between the two dates?</p> <p>11 A Are January 7th and January 26th different dates?</p> <p>12 Q Yeah. And how much --</p> <p>13 A They're different dates.</p> <p>14 Q -- time is between them, how many days?</p> <p>15 A It seems like it would be 19 days.</p> <p>16 Q Right. And would someone have an opportunity to file</p> <p>17 a request for a continued examination and then file an</p> <p>18 IDS of the cited references in the utility case?</p> <p>19 A Don't know. I'm not a patent attorney. I don't know.</p> <p>20 Q It's filed electronically. Can you file</p> <p>21 electronically in one day?</p> <p>22 A I don't know. I've never filed one. I can't answer</p> <p>23 that question. There's no way I can answer your</p> <p>24 question.</p> <p>25 Q And so Johnsonville has no idea that it could have</p>	<p>1 was ever a specific decision made.</p> <p>2 Q Just all in the sky, all electronic things floating</p> <p>3 around. No decisions made by anybody?</p> <p>4 MS. WILBERT: Objection. Argumentative and</p> <p>5 vague. What is the reference to the sky? Why is</p> <p>6 this funny?</p> <p>7 MR. FEMAL: The cloud. It's all in the</p> <p>8 cloud.</p> <p>9 BY MR. FEMAL:</p> <p>10 Q In short, you had plenty of time to file a request for</p> <p>11 a continued examination. Why wasn't it done?</p> <p>12 A So again, that would be your supposition that we had</p> <p>13 plenty of time. I honestly don't know the answer to</p> <p>14 that question. I'm not a patent attorney. Why wasn't</p> <p>15 it done? We don't have knowledge of why it was not</p> <p>16 done.</p> <p>17 Q Yeah.</p> <p>18 A We provided the evidence that we have and the facts</p> <p>19 that we have that would pertain to this question. We</p> <p>20 don't have any evidence to suggest there was any</p> <p>21 specific decision not to file that or disclose that.</p> <p>22 Q Was there intent to have the design case issue without</p> <p>23 the examiner knowing about the utility references?</p> <p>24 A We are not aware of any intent to do that.</p> <p>25 Q Why do you think there's no intent?</p>
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<p>1 filed a request for a continued examination?</p> <p>2 A I'm not suggesting Johnsonville has no idea, but I'm</p> <p>3 suggesting you're asking me a question specifically</p> <p>4 about the time it takes to file. I'm not qualified</p> <p>5 personally to answer that question.</p> <p>6 Q Okay. How about the fact that you now know of two new</p> <p>7 references rejecting utility, which has the same</p> <p>8 drawings as the design, would you think about maybe</p> <p>9 allowing the examiner on the design to know about</p> <p>10 those two new references cited in the utility?</p> <p>11 MS. WILBERT: Objection. Vague,</p> <p>12 argumentative.</p> <p>13 A Yeah, I won't answer that question. You need to</p> <p>14 rephrase that.</p> <p>15 BY MR. FEMAL:</p> <p>16 Q Sure, I'll rephrase it. Why wouldn't you cite the new</p> <p>17 prior art to the design examiner?</p> <p>18 A I don't know why you wouldn't cite that. I don't know</p> <p>19 why it wasn't cited.</p> <p>20 Q Would that be deceptive?</p> <p>21 A If there were intent to deceive, I suppose it would</p> <p>22 be. Again, it's our position that nobody at</p> <p>23 Johnsonville intended to deceive anybody at the U.S.</p> <p>24 Patent Office. We don't have details of what exactly</p> <p>25 transpired and we don't have any evidence that there</p>	<p>1 A Johnsonville, at its core, is focused on being an</p> <p>2 ethical company, and integrity is one of our core</p> <p>3 values that we learn -- I learned in my first week at</p> <p>4 Johnsonville. It's expected that we operate with</p> <p>5 integrity and with honesty. While I don't know all</p> <p>6 the details of what may or may not happen, we provided</p> <p>7 all the details that we have. I know that the</p> <p>8 expectation at Johnsonville would be anyone in that</p> <p>9 situation would act ethically and honestly.</p> <p>10 (Exhibit 230 identified)</p> <p>11 Q I would like to enter into -- as Exhibit 220, or 230</p> <p>12 -- yeah.</p> <p>13 THE REPORTER: Not the front, this page?</p> <p>14 MR. FEMAL: No, the whole thing.</p> <p>15 Q And turning to page 5, interrogatory number 5, the</p> <p>16 question is asked of Johnsonville: "State all reasons</p> <p>17 utility app 717 was not disclosed to the examiner of</p> <p>18 the patent in suit during the prosecution of the</p> <p>19 patent in suit, and for each stated reason provide a</p> <p>20 detailed explanation of the facts supporting such</p> <p>21 reason." And would you read Johnsonville's answer?</p> <p>22 A Could you clarify for me really quickly which topic</p> <p>23 we're on?</p> <p>24 Q You're on the topic on decision not to disclose office</p> <p>25 action rejecting U.S. patent application.</p>

<p style="text-align: center;">Page 109</p> <p>1 A Okay. Okay.</p> <p>2 Q And these are your sworn, signed interrogatory</p> <p>3 answers?</p> <p>4 A Yes. So what did you ask me to read again?</p> <p>5 Q The question that we asked Johnsonville Corporation</p> <p>6 is, state all reasons why you didn't cite the utility</p> <p>7 patent application to the examiner of the patent in</p> <p>8 suit, which is the design patent, during the</p> <p>9 prosecution of the patent in suit because you hadn't</p> <p>10 paid the issue fee yet, so it's still pending, and for</p> <p>11 each stated reason provide a detailed explanation of</p> <p>12 the facts supporting each reason. And what answer did</p> <p>13 Johnsonville have?</p> <p>14 A Under interrogatory number 5?</p> <p>15 Q Yes. What was your answer?</p> <p>16 A I will read the answer. In its entirety?</p> <p>17 Q Yeah, you can read it in entirety.</p> <p>18 A Okay. "Johnsonville objects to this interrogatory as</p> <p>19 overly broad, unduly burdensome, and not reasonably</p> <p>20 calculated to lead to the discovery of admissible</p> <p>21 evidence, particularly through the use of the term</p> <p>22 'all reasons.' Johnsonville further objects to this</p> <p>23 interrogatory to the extent it calls for information</p> <p>24 that is subject to the attorney-client privilege</p> <p>25 and/or work product production. Johnsonville objects</p>	<p style="text-align: center;">Page 111</p> <p>1 application for the 754 patent. As further explained</p> <p>2 in the declaration of Timothy Newholm, given the</p> <p>3 differences in the interpretation of the subject</p> <p>4 matter of design and utility patent applications, the</p> <p>5 manner in which the scope of protection defined by</p> <p>6 utility and design patent applications is defined and</p> <p>7 the scope of the claims of those patent applications,</p> <p>8 the positions taken by an examiner in charge of</p> <p>9 utility patent application may have little or no</p> <p>10 relevance to a co-pending design patent application</p> <p>11 for the same or similar article, and thus would not be</p> <p>12 material to the design patent application as that term</p> <p>13 is designed either by Rule 56 or by Therasense. See</p> <p>14 DKT16-57."</p> <p>15 Q Is this a truthful answer?</p> <p>16 A Yes, it is,</p> <p>17 Q Do you stand by this answer?</p> <p>18 A Yes.</p> <p>19 Q On page 6, first paragraph in the middle, line 4,</p> <p>20 starting actually with line 3, you say there was not a</p> <p>21 disclosure to the examiner of the patent in suit</p> <p>22 during the prosecution of the patent in suit. You say</p> <p>23 they --</p> <p>24 MS. WILBERT: I think I'm lost.</p> <p>25 BY MR. FEMAL:</p>
<p style="text-align: center;">Page 110</p> <p>1 to Klement's definition of "plaintiff" and</p> <p>2 "Johnsonville" as vague, ambiguous, overly broad, and</p> <p>3 unduly burdensome with respect to the inclusion of any</p> <p>4 attorney, accountant, assign, agent, representative,</p> <p>5 or person acting on its behalf. Klement has</p> <p>6 separately issued subpoenas to the attorneys that</p> <p>7 prosecuted the 754 patent and is treating those</p> <p>8 attorneys as separate from Johnsonville. Johnsonville</p> <p>9 shall respond to this interrogatory only on behalf of</p> <p>10 itself and thus shall interpret the terms "plaintiff"</p> <p>11 and "Johnsonville" to mean Johnsonville Sausage, LLC.</p> <p>12 Johnsonville also objects to this interrogatory to the</p> <p>13 extent it seeks information that is not within</p> <p>14 Johnsonville's possession, custody, or control.</p> <p>15 Subject to and without waiver of the foregoing</p> <p>16 objections, and reserving the right to assert</p> <p>17 additional objections, Johnsonville responds as</p> <p>18 follows: The specific reasons the utility app 717 was</p> <p>19 not disclosed to the examiner of the patent in suit</p> <p>20 during the prosecution of the patent in suit are not</p> <p>21 within Johnsonville's possession, custody, or control.</p> <p>22 However, as explained in the declaration of Timothy</p> <p>23 Newholm, utility app 717 is not material to</p> <p>24 patentability because it does not give rise to a prima</p> <p>25 facie case of unpatentability of the claim of the</p>	<p style="text-align: center;">Page 112</p> <p>1 Q -- the specific reasons --</p> <p>2 MS. WILBERT: Where are you reading from?</p> <p>3 BY MR. FEMAL:</p> <p>4 Q -- you say --</p> <p>5 MR. FEMAL: Page 6 in the middle, starting</p> <p>6 with subject 2, paragraph.</p> <p>7 MS. WILBERT: Thank you.</p> <p>8 BY MR. FEMAL:</p> <p>9 Q You state that the reasons why it wasn't disclosed to</p> <p>10 the examiner are not within Johnsonville's possession,</p> <p>11 custody, or control. Does that mean that you never</p> <p>12 knew what those reasons were?</p> <p>13 A It means we thoroughly investigated the reasons around</p> <p>14 that. We provided all relevant information, and we do</p> <p>15 not have an answer as to why the utility app was not</p> <p>16 disclosed.</p> <p>17 Q If it's not in your possession, custody, or control,</p> <p>18 is it in the possession, custody, and control of</p> <p>19 Quarles & Brady?</p> <p>20 MS. WILBERT: Objection. Foundation.</p> <p>21 A I won't answer that.</p> <p>22 BY MR. FEMAL:</p> <p>23 Q You have to answer the question.</p> <p>24 A Would you like to rephrase it is, and why it's not --</p> <p>25 Q I said, if you're not in the possession -- says</p>

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<p>1 Johnsonville -- is not within Johnsonville's</p> <p>2 possession, custody, or control. Well, it's in</p> <p>3 somebody's possession, custody, or control. Is it in</p> <p>4 possession, custody, and control of your attorneys</p> <p>5 Quarles & Brady?</p> <p>6 A Again, we have turned over all relevant information</p> <p>7 related to that question, and there is no additional</p> <p>8 information available that does not waive privilege.</p> <p>9 There is nothing else to provide on that topic.</p> <p>10 Q In short is what you're saying is that you never had</p> <p>11 possession, custody, or control of that answer?</p> <p>12 MS. WILBERT: Objection. Misstates previous</p> <p>13 testimony.</p> <p>14 BY MR. FEMAL:</p> <p>15 Q Is that true, it's not in Johnsonville's possession,</p> <p>16 custody, or control?</p> <p>17 A Johnsonville understands that its employees involved</p> <p>18 in the prosecution of this patent, and in terms of</p> <p>19 disclosing of the utility patent, acted in good faith</p> <p>20 and did not attempt to deceive the patent office. We</p> <p>21 further understands that -- we further understand that</p> <p>22 employees involved in the prosecution of the patent do</p> <p>23 not recall or do not know the specific reason why the</p> <p>24 prior art or the utility application were not</p> <p>25 disclosed during the prosecution of the design</p>	<p>1 "anything."</p> <p>2 I guess I'll also caution, to the extent</p> <p>3 they have -- that you have information that was</p> <p>4 communicated through Quarles & Brady as a result</p> <p>5 of conversation with attorneys --</p> <p>6 THE WITNESS: Yeah.</p> <p>7 MS. WILBERT: -- do not reveal the</p> <p>8 attorney-client communication.</p> <p>9 THE WITNESS: Of course.</p> <p>10 MS. WILBERT: To the extent they told you</p> <p>11 something that you feel is responsive independent</p> <p>12 of advice of counsel, you can provide those</p> <p>13 facts.</p> <p>14 BY MR. FEMAL:</p> <p>15 Q What kind of information was disclosed amongst the</p> <p>16 Johnsonville employees?</p> <p>17 A In my conversations with the employees, I asked David</p> <p>18 Nicholson briefly about a prototype tray that was</p> <p>19 asked for. My conversation with Steve Laack was -- I</p> <p>20 don't recall the conversation with Steve Laack, other</p> <p>21 than that we talked for a couple of minutes. I</p> <p>22 believe it was tied to purchase orders. My</p> <p>23 conversation with Jim Mueller was more focused on --</p> <p>24 and I had more extensive conversation with Jim Mueller</p> <p>25 -- more focused on consumer research, the entire</p>
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<p>1 application.</p> <p>2 Q And then in the next sentence, you state the</p> <p>3 declaration of Timothy Newholm, which was provided in</p> <p>4 this lawsuit, that the utility app 717 is not material</p> <p>5 to the patentability because it does not give rise to</p> <p>6 prima facie case of unpatentability of the claim of</p> <p>7 the application for the 754 patent. And then it gives</p> <p>8 docket 16, paragraph 60 to 62. Do you fully adopt and</p> <p>9 believe that declaration of Timothy Newholm was</p> <p>10 correct in all phases?</p> <p>11 A Yes, we do.</p> <p>12 Q So you stand by the...</p> <p>13 A Define -- I guess, define "in all phases." But as it</p> <p>14 pertains to this statement, yes, we trust his</p> <p>15 expertise.</p> <p>16 Q Which Johnsonville employees did you ask about why</p> <p>17 this wasn't disclosed?</p> <p>18 A So we talked to Jim Mueller, we talked to David</p> <p>19 Nicholson, we talked to Steve Laack, pertaining to the</p> <p>20 time period in question. That was five months ago</p> <p>21 when we first scheduled this deposition, so I'm trying</p> <p>22 to recall. Certain of those three individuals.</p> <p>23 Q And none of those individuals knew anything about why</p> <p>24 it was not disclosed?</p> <p>25 MS. WILBERT: Objection. Vague as to</p>	<p>1 chronology of how we developed this design patent, and</p> <p>2 the marketing desire to find a curved and unique tray.</p> <p>3 Q Were there any --</p> <p>4 A Those were my conversations with those gentlemen.</p> <p>5 Q Were there any affidavits, notes, or statements from</p> <p>6 them in writing or other things related to?</p> <p>7 A Can you -- I'm sorry, can you please --</p> <p>8 Q Yeah, were there any, you know, affidavits, like this</p> <p>9 declaration that Newholm provided? Did Jim Mueller,</p> <p>10 or Nicholson, or Laack provide any affidavits around</p> <p>11 the subject matter of why decided not to disclose the</p> <p>12 717 utility application --</p> <p>13 A In my conversations with --</p> <p>14 Q -- prior -- yeah.</p> <p>15 A -- them representing the company, I never saw anything</p> <p>16 like that, no.</p> <p>17 Q There's no notes or statements from them?</p> <p>18 A In my conversations with them representing the</p> <p>19 company, I did not see any of those statements,</p> <p>20 affidavits, or anything that you speak of. We had</p> <p>21 several informal conversations.</p> <p>22 Q Now, an important third party, Mr. Benson, that was</p> <p>23 involved in turning over his inventions to the</p> <p>24 Johnsonville company, did you ask Mr. Benson about any</p> <p>25 nondisclosures, and why not?</p>

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<p>1 application. I don't see any reference to...</p> <p>2 Q Did Luke send --</p> <p>3 A ...Dean -- to Dean Benson being included in those</p> <p>4 communications.</p> <p>5 Q Did Luke send the final rejection to David Nicholson</p> <p>6 via email?</p> <p>7 A It merely says, "On May 12th, 2011, the extent of our</p> <p>8 understanding is that Johnsonville received from</p> <p>9 Quarles & Brady the final office action entered by the</p> <p>10 examiner in the utility application." That's the</p> <p>11 extent of the information I have...</p> <p>12 Q Okay.</p> <p>13 A ...regarding that.</p> <p>14 Q There's no reference to Benson?</p> <p>15 A There is not. That's the information we have.</p> <p>16 Q Is it safe for me to assume that you stand by all of</p> <p>17 the answers to the interrogatories that you have</p> <p>18 before you?</p> <p>19 A I would assume, yes.</p> <p>20 Q Any that you reject at this point?</p> <p>21 A Representing Johnsonville, I accept these answers as</p> <p>22 valid.</p> <p>23 Q In interrogatory number 7, where it says, "State all</p> <p>24 reasons the office actions issued in the utility</p> <p>25 application 717 received and were not disclosed to the</p>	<p>1 application for the 754. In other words, it's stating</p> <p>2 that the 717 prior art is not material to the</p> <p>3 prosecution of the design patent application. That's</p> <p>4 what it's stating. Is that a true statement?</p> <p>5 A I'm having to take your word that that's what it's</p> <p>6 stating. Again, I'm not -- I'm not a lawyer, and so</p> <p>7 I'm not familiar with "prima facie" or what that</p> <p>8 means. I don't feel qualified to give you an answer</p> <p>9 because it's requiring interpretation.</p> <p>10 Q But in short, you rely on Timothy Newholm to state</p> <p>11 that the patentability of the 717 is not material to</p> <p>12 the 754?</p> <p>13 A I can read that sentence if you'd like me to read that</p> <p>14 sentence. I'm not going to interpret it. I think the</p> <p>15 sentence you're focusing on is, "However, as explained</p> <p>16 in the declaration of Timothy Newholm, the office</p> <p>17 actions in utility app 717 are not material to</p> <p>18 patentability because they do not give rise to a prima</p> <p>19 facie case of unpatentability of the claim of the</p> <p>20 application for the 754 patent."</p> <p>21 Q Is there any reason why information that you say is</p> <p>22 not in your control and possession is not in your</p> <p>23 control and possession to answer those questions?</p> <p>24 A Again, it's been our stated opinion that we provided</p> <p>25 all the information that we can in this case. There</p>
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<p>1 examiner of the patent in suit during the prosecution</p> <p>2 of the patent in suit. For each stated reason,</p> <p>3 provide a detailed explanation of the facts supporting</p> <p>4 each reason." And then you drop down to the middle of</p> <p>5 that page, and it's "subject to, without waiver,</p> <p>6 foregoing objections, and reserving our rights, we</p> <p>7 state as follows." And you basically are repeating</p> <p>8 that you rely on Timothy Newholm's response to the</p> <p>9 office actions that their 717 are not material to</p> <p>10 patentability. See that?</p> <p>11 A Which paragraph? Sorry.</p> <p>12 Q Page 8, second full paragraph.</p> <p>13 A Oh, yeah. Yes, I see that.</p> <p>14 Q Yeah. Do you hold true that they don't give rise to</p> <p>15 patentability due to a prima facie case of</p> <p>16 unpatentability of the claim or the applications for</p> <p>17 the 754?</p> <p>18 A I --</p> <p>19 MS. WILBERT: Objection. Vague.</p> <p>20 A Yeah, I don't understand your question. Can you</p> <p>21 please restate that?</p> <p>22 BY MR. FEMAL:</p> <p>23 Q It states there that the 717 are not material to</p> <p>24 patentability because they do not give rise to a prima</p> <p>25 facie case of unpatentability of the claim of the</p>	<p>1 are situations where -- and I'll read specifically</p> <p>2 what I read before -- "understands that its employees</p> <p>3 involved in the prosecution of the patent do not</p> <p>4 recall or do not know the specific reason why." So we</p> <p>5 have provided the information that we have available.</p> <p>6 Q But you're standing by the fact that you do believe</p> <p>7 that Timothy Newholm's, that affidavit or declaration</p> <p>8 is correct?</p> <p>9 A So I take that at face value based on this document.</p> <p>10 I personally do not know who Timothy Newholm is.</p> <p>11 Q Do you know which employees did not recall the reasons</p> <p>12 for nondisclosure of the 717 utility application</p> <p>13 rejection?</p> <p>14 A So I know the employees that were spoken to in regard</p> <p>15 to this proceeding were, again, Steve Laack, David</p> <p>16 Nicholson, Jim Mueller. We know that there were other</p> <p>17 -- other members of Johnsonville that were kept in the</p> <p>18 loop, so to speak, but in terms of the primary</p> <p>19 contact, David Nicholson was the person at</p> <p>20 Johnsonville primarily responsible for prosecution of</p> <p>21 the utility application. David Nicholson kept Kevin</p> <p>22 Ladwig, Michael Suprick, Jim Mueller, Steve Laack, and</p> <p>23 Kara Lichtenberg generally informed of the</p> <p>24 prosecution, but those individuals had little to no</p> <p>25 involvement in the prosecution.</p>

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<p>1 being made. Again, my note here, "Neither 2 Johnsonville nor its patent counsel disclosed the 3 Reskow reference during the prosecution of the utility 4 application. Examiner Byron P. Gehman identified the 5 Reskow reference as alleged prior art to the utility 6 application during the examination of the utility 7 application." So we had -- that's the extent of the 8 information I would have on that. 9 Q Okay. And so you would have no -- just to go through 10 them here, you'd have no idea why this wasn't cited? 11 A Why it wasn't disclosed? 12 Q Yeah. 13 A We don't know why. 14 Q And it definitely was not disclosed to the examiner by 15 Johnsonville or Quarles? 16 A I'm sorry, one more time? 17 Q I said the Reskow reference was not disclosed by 18 Johnsonville or by your attorneys Quarles to the 19 examiner? 20 A To the design -- 21 Q Design examiner, right. 22 A -- patent design. That is correct. 23 Q And again, who made that decision, you're not sure? 24 A Again, you characterize it as a decision. I'll 25 continue to state that we don't have any evidence that</p>	<p>1 know, omission by your counsel? 2 MS. WILBERT: Objection. Compound. 3 BY MR. FEMAL: 4 Q So is this whole thing, can we sum it up to just an 5 omission? 6 A We don't know what happened. We don't -- again, we 7 don't have -- in providing all the information we do 8 have, there is nothing in anything we discovered that 9 would indicate a decision, an omission, or anything of 10 the sort that you're characterizing. We simply don't 11 know what happened. 12 Q Well, certain actions were taken in both the 13 prosecution of the design patent that you went ahead 14 and paid the issue fee, and a decision was later to -- 15 although, I think Luke said he was going to respond to 16 the examiner, after their summary in the utility there 17 was no response, just an abandonment. Are we to take 18 these omissions as somehow deceptive? 19 A No. Again, we would not, as a company, characterize 20 any of these actions as intent to deceive the U.S. 21 Patent Office. We don't know exactly what happened. 22 Q When did Johnsonville first become aware of the Reskow 23 reference? 24 A Let me get the exact date. One moment. Just a second 25 here. Let me make sure I'm giving the right time</p>
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<p>1 there was an intentional decision made to disclose, 2 not to disclose, or anything of the sort. We don't 3 believe there was any bad faith in what went forward, 4 and we don't know exactly what happened because the 5 people that were there at the time do not recall or 6 remember what specifically occurred. 7 Q Again, in the interrogatories in regards to Reskow and 8 other references on patentability, you did not -- did 9 not discuss that amongst yourselves or view that as 10 something that would prevent patentability of the 11 design case? 12 MS. WILBERT: Objection. Vague. 13 BY MR. FEMAL: 14 Q In other words, when you came upon the Reskow 15 reference, did you feel that that might prevent the 16 issuance of the design patent application? 17 A Are you referencing something in the interrogatory? 18 I'm not certain what -- what your context is. 19 Q Yeah. The -- referencing interrogatory 7 and 8, where 20 you're discussing not referencing the prior art that's 21 cited in the 717 patent, which would include Reskow 22 and would include Mello, are there any basis for not 23 disclosing those references, other than an omission, 24 because you don't seem to have any possession, 25 custody, or control of any information, or just, you</p>	<p>1 frame. The Reskow reference -- making sure I have the 2 right document in front of me. All right. So the 3 Reskow reference came to light for Johnsonville in 4 January 2011 when the -- as part of the office action 5 from the examiner who then cited Reskow. 6 Q So when David Nicholson got a copy of the office 7 action, did David Nicholson tell Luke that he should 8 disclose the Reskow reference to the design examiner? 9 MS. WILBERT: Objection. Calls for 10 information subject to the attorney-client 11 privilege. 12 I instruct you not to answer or otherwise 13 disclose communications between prosecution 14 counsel and Johnsonville employees. 15 A I will not answer the question. 16 BY MR. FEMAL: 17 Q Okay. Any reason why this Reskow reference was not 18 disclosed to the examiner on the design patent? 19 MS. WILBERT: Objection. Calls for 20 information subject to the attorney-client 21 privilege. 22 You may respond, but please do not reveal 23 the substance of communications between 24 Johnsonville employees and prosecution counsel. 25 A Yeah. I have no further information other than what</p>

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<p style="text-align: center;">Page 145</p> <p>1 conversations with Johnsonville employees specifically</p> <p>2 pertaining to this topic.</p> <p>3 Q Move on to the next topic, decision to not disclose</p> <p>4 U.S. Patent Application 29353610 to the examiner</p> <p>5 assigned to the utility app 717. Let's back up. Who</p> <p>6 talked to the employees about the Mello patent?</p> <p>7 A Who talked to the --</p> <p>8 Q Who talked to the employees about the Mello patent?</p> <p>9 A As Johnsonville, I didn't talk to any other employees</p> <p>10 about the Mello patent.</p> <p>11 Q I thought previously you said there was some</p> <p>12 discussions amongst Mueller, Laack, and yourself.</p> <p>13 A Not pertaining to this specific topic.</p> <p>14 Q Okay. Were there the same or any employees asked</p> <p>15 about why Mello was not disclosed?</p> <p>16 A No, not by Johnsonville.</p> <p>17 Q And again, a decision not to disclose U.S. Patent</p> <p>18 Application 29353610 to the examiner assigned to the</p> <p>19 utility application 717, why was that not disclosed?</p> <p>20 A Johnsonville understands that its employees involved</p> <p>21 in the prosecution of the patent turned over to</p> <p>22 Johnsonville's attorneys all information they believed</p> <p>23 to be material to patentability. Johnsonville</p> <p>24 understands that its employees involved in the</p> <p>25 prosecution of the patent have never attempted to</p>	<p style="text-align: center;">Page 147</p> <p>1 prosecution of the patent do not recall making a</p> <p>2 decision about that.</p> <p>3 BY MR. FEMAL:</p> <p>4 Q Was Johnsonville involved in the decision to respond</p> <p>5 to the office actions?</p> <p>6 A Decision to respond to office actions?</p> <p>7 Q Uh-huh.</p> <p>8 MS. WILBERT: Objection. Vague.</p> <p>9 A Can you be more specific?</p> <p>10 BY MR. FEMAL:</p> <p>11 Q Yes. Was Johnsonville --</p> <p>12 A There's -- we're talking about several applications</p> <p>13 and --</p> <p>14 Q Was Johnsonville involved in responding to the office</p> <p>15 actions in either the design patent or the utility</p> <p>16 patent?</p> <p>17 MS. WILBERT: Objection. Compound.</p> <p>18 A Would you like to be more specific?</p> <p>19 BY MR. FEMAL:</p> <p>20 Q Was Johnsonville involved in the design patent</p> <p>21 application response?</p> <p>22 A Can you specify the -- again, the design application</p> <p>23 response?</p> <p>24 Q Yes. The design application that resulted in this 754</p> <p>25 patent.</p>
<p style="text-align: center;">Page 146</p> <p>1 deceive the patent office by failing to disclose</p> <p>2 material information. Johnsonville understand that</p> <p>3 its employees involved in the prosecution of the</p> <p>4 patent do not recall or do not know the specific</p> <p>5 reason why the design application was not disclosed</p> <p>6 during the prosecution of the utility application.</p> <p>7 Johnsonville understands that its employees involved</p> <p>8 in the prosecution of the patent do not recall making</p> <p>9 a decision about whether or not they should disclose</p> <p>10 the design application to the examiner assigned to the</p> <p>11 utility application.</p> <p>12 Q Again, who made that decision?</p> <p>13 A Johnsonville understands its employees involved in the</p> <p>14 prosecution of the patent do not recall making a</p> <p>15 decision about whether or not they should disclose the</p> <p>16 design application to the examiner.</p> <p>17 Q Who made the decision to respond to office actions?</p> <p>18 A Johnsonville --</p> <p>19 MS. WILBERT: Objection to the extent this</p> <p>20 calls for information subject to the</p> <p>21 attorney-client privilege.</p> <p>22 You can respond, but do not reveal the</p> <p>23 substance of communications with attorneys in</p> <p>24 your response.</p> <p>25 A Johnsonville understand its employees involved in the</p>	<p style="text-align: center;">Page 148</p> <p>1 A Okay. The information I have says that Johnsonville</p> <p>2 received the notice of allowance of its design</p> <p>3 application from Quarles & Brady on November 2nd,</p> <p>4 2010. On March 8th, 2011, Johnsonville received from</p> <p>5 Quarles & Brady the issue notification of the design</p> <p>6 patent. That's the extent of the knowledge the</p> <p>7 company has about that interaction.</p> <p>8 Q And the utility patent?</p> <p>9 A For the utility patent -- and again, you're asking</p> <p>10 about -- remind me of the question.</p> <p>11 Q Yes.</p> <p>12 A All responses to --</p> <p>13 Q All responses to the office actions --</p> <p>14 A Okay.</p> <p>15 Q -- in the utility patent.</p> <p>16 A Okay. Let me read through what information we have</p> <p>17 available. And again, it's referring to the U.S.</p> <p>18 Patent Office, correct?</p> <p>19 Q Yes.</p> <p>20 A Okay. It says here that December 20th, 2010,</p> <p>21 Johnsonville received from Quarles & Brady the</p> <p>22 restriction requirement entered by the examiner of the</p> <p>23 utility application.</p> <p>24 December 23rd, 2010, Johnsonville received a copy</p> <p>25 of the filed response to the restriction requirement.</p>